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RESCISSION BY PAROL AGREEMENT.

The discharge of a contract by the parol agreement of the parties would seem on principle to require the same elements of mutual consent and consideration that are necessary for the formation of simple contracts; and certainly this is the general rule.

If the parties to a bilateral contract agree to rescind it there is no difficulty in regard to consideration, whether the agreement to rescind is made before or after the breach of the original contract, so long as neither party has completely performed his obligation. The promise of one party to forego his rights under the contract is sufficient consideration for the promise of the other party to forego his rights.[1]

The agreement to rescind need not be express. Mutual assent to abandon a contract may be inferred from circumstances[2] and sometimes from circumstances of a negative character, such as the failure to take any steps looking towards the enforcement or performance of the contract.[3] Also "a subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former

[1] King *v.* Gillett (1840) 7 M. & W. 55; Farrar *v.* Toliver (1878) 88 Ill. 408; Rollins *v.* Marsh (1880) 128 Mass. 116; Brigham *v.* Herrick (1899) 173 Mass. 460, 467; Blagborne *v.* Hunger (1894) 101 Mich. 375; Spier *v.* Hyde (1903) 78 N. Y. App. Div. 151, 158; Dreifus *v.* Columbian Salvage Co. (1900) 194 Pa. 475, 486; Blood *v.* Enos (1839) 12 Vt. 625; Montgomery *v.* American Central Ins. Co. (1900) 108 Wis. 146, 159.

[2] Green *v.* Wells 2 Cal. 584; Heinlin *v.* Fish (1862) 8 Minn. 70; Fine *v.* Rogers (1851) 15 Mo. 315; Chouteau *v.* Jupiter Iron Works (1887) 94 Mo. 388; Wheeden *v.* Fiske (1870) 50 N. H. 125. See also cases cited in note 4 *infra.*

[3] Hobbs *v.* Columbia Falls Brick Co. (1892) 157 Mass. 109; Mowry *v.* Kirk (1869) 19 Ohio St. 375.

contract, so that the two cannot stand together, rescinds, substitutes, and is substituted for the earlier contract and becomes the only agreement of the parties on the subject."[1]

If the original contract was unilateral or has since its formation become unilateral by the performance of one side of the contract, a mutual agreement to rescind without more has no consideration. As one party only was entitled to anything under the original contract at the time of the attempted rescission, he alone promises to give up anything by agreeing to rescind.

These principles are clearly recognized by the decisions[2] except in two classes of cases:

1. Agreements made before breach of a unilateral contract to discharge the promisor.

2. Agreements to discharge a party to a negotiable instrument, whether the agreement be made before or after maturity of the instrument.

AGREEMENTS MADE BEFORE BREACH OF A UNILATERAL SIMPLE CONTRACT TO DISCHARGE THE PROMISOR.

In several short cases decided about the year 1600, it was decided or said that such an agreement was effectual.[3]

[1] Housekeeper Pub. Co. *v.* Swift (C. C. A. 1899) 97 Fed. Rep. 290. See in accord, Patmore *v.* Colburn (1834) 1 C. M. & R. 65, 71; Stow *v.* Russell (1864) 36 Ill. 18, 30; Harrison *v.* Polar Star Lodge (1886) 116 Ill. 279, 287; Holbrook *v.* Electric Appliance Co. (1899) 90 Ill. App. 86; Western Ry. Equipment Co. *v.* Missouri Iron Co. (1900) 91 Ill. App. 28, 37; Thompson *v.* Elliott (1867) 28 Ind. 55; Paul *v.* Meservey (1870) 58 Me. 419; Howard *v.* Wilmington, &c. R. Co. (1843) 1 Gill, 311, 340; Smith *v.* Kelly (1897) 115 Mich. 411; Chresman *v.* Hodges (1882) 75 Mo. 413, 415; Tuggles *v.* Callison (1897) 143 Mo. 527, 536; McClurg *v.* Whitney (1899) 82 Mo. App. 625; Reinard *v.* Sampson (1855) 12 N. Y. 561, 568. Compare Rhoades *v.* Chesapeake, &c. R. Co. (1901) 49 W. Va. 494.

[2] Foster *v.* Dawber (1851) 6 Ex. 851; Edwards *v.* Walters (1896) 2 Ch. 157, 168; Westmoreland *v.* Porter (1883) 75 Ala. 452; Florence Cotton Co. *v.* Field (1894) 104 Ala. 471; Mobile &c. R. R. Co. *v.* Owen (1898) 121 Ala. 505; Swan *v.* Benson (1877) 31 Ark. 728; Mendall *v.* Davis (1885) 46 Ark. 420; Davidson *v.* Burke (1892) 143 Ill. 139; Metcalf *v.* Kent (1898) 104 Iowa, 487; Averill *v.* Wood (1889) 78 Mich. 342, 354; Young *v.* Power (1866) 41 Miss. 197; Northwestern Nat. Bank *v.* Great Falls Opera House (1899) 23 Mont. 1; Landon *v.* Hutton (1892) 50 N. J. Eq. 500; Crawford *v.* Millspaugh (1816) 13 Johns. 87; Whitehill *v.* Wilson (1832) 3 Pen. & Watts, 405, 413; Kidder *v.* Kidder (1859) 33 Pa. 268; Collyer *v.* Moulton (1868) 9 R. I. 90.

[3] Coniers and Holland's Case (1588) 2 Leon. 214; Langden *v.* Stokes (1634) Cro. Car. 383; Edwards *v.* Weeks (1677) 2 Mod. 259. See also Treswaller *v.* Keyne (1621), Cro. Jac. 620; May *v.* King (1701) 12 Mod. 537; Weston *v.* Mowlin (1760) 2 Burr. 969, 978.

The appropriate words for alleging such an agreement were that the plaintiff exonerated or discharged the defendant. The point seems not to have been again discussed until the nineteenth century, when several cases were decided which touch upon it.

In King *v.* Gillett,[1] the plea to an action for breach of promise of marriage was that before any breach the plaintiff "absolved, exonerated, and discharged the defendant." On special demurrer it was urged that the plea should have alleged rescission by mutual assent. But the plea was held good on the strength of the early decisions. The court, however, said the question was merely as to a matter of form, for though the plea was good, "yet we think the defendant will not be able to succeed upon it at *nisi prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself, and this in effect will be a rescinding of the contract previously made." It seems to be supposed by some writers[2] that this decision in some way discredits the early authorities, but this seems to be a mistake. The court simply said that mutual assent was necessary to make out the defence, but this is not saying that consideration was needed, and in later decisions the English courts have never considered King *v.* Gillett. As the contract in that case was bilateral, there was, undoubtedly, consideration if there was an agreement to rescind. The question was, as the court said, merely one of form.

Dobson *v.* Espie,[3] was an action for the breach of an independent obligation to pay a deposit to an auctioneer as security for future performance of a contract for the sale of property, and the defendant pleaded leave and license. On demurrer the court held the plea bad as not equivalent to "exonerated and discharged," but the implication is clear that a plea in the latter form would have been held good, and one member of the court, Bramwell, B., not only says so, but expresses the opinion that even in its actual form the plea was good, saying:

[1] (1840) 7 M. & W. 55.

[2] Anson on Contracts (10th ed.) 292; Clark on Contracts, 609.

[3] (1857) 2 H. & N. 79.

"In an action on a simple contract, a plea of exoneration before breach is good. The law is thus laid down in Byles on Bills, p. 168, 7th ed.[1]: 'It is a general rule of law, that a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration; but after breach there can be no discharge except by deed or upon sufficient consideration.' Assuming, then, that a plea of exoneration before breach would have been good in this case, I thought that the present plea might be so read; and, therefore, if sitting alone, I should have been disposed to hold it good."

There is a dictum to the same effect by Lindley, L. J., in the recent case of Edwards *v.* Walters.[2]

It is true that Parke, B., in Foster *v.* Dawber,[3] said *obiter* "an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment." It is to be noticed, however, that Parke is not speaking of the situation before breach and though his remark is applicable both to broken and unbroken contracts, cases arise far more commonly in regard to the former. In any event, Parke was speaking without having the authorities before him and with his mind addressed to another matter. In view of the later case of Dobson *v.* Espie,[4] the English law seems still to be that exoneration before breach is good without consideration.

In the United States there are a few dicta[5] to the same effect, and there is a decision in Wisconsin[6] involving the point, which held the exoneration good. But there are authorities of contrary effect,[7] and in view of this as well as the opinion of American text writers,[8] and the absence of any underlying principle to support the English doctrine, it seems probable that consideration will, in most states, be held essential.

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[1] So in 16th ed., p. 311; 1 Smith's Leading Cases (11th Eng. ed.) 350, (9th Am. ed.) 614.

[2] (1896) 2 Ch. 157, 168. [3] (1851) 6 Ex. 851. [4] (1857) 2 H. & N. 79.

[5] Robinson *v.* McFaul (1854) 19 Mo. 549; Seymour *v.* Minturn (1819) 17 Johns. 169, 175; Kelly *v.* Bliss (1882) 54 Wis. 187, 191.

[6] Hathaway *v.* Lynn, 75 Wis. 551.

[7] Hale *v.* Dressen (1899) 76 Minn. 183; Collyer *v.* Moulton (1868) 9 R. I. 90; Ripley *v.* Ætna Ins. Co. (1864) 30 N. Y. 136, 164. See also Bowman *v.* Wright (1902) 65 Neb. 661; Purdy *v.* Rome, etc., R. Co. (1891) 125 N. Y. 209.

[8] Clark on Contracts, 608; Harriman on Contracts (2d ed.) § 505; 24 Am. & Eng. Encyc. of Law (2d ed.) 287.

AGREEMENT TO DISCHARGE A PARTY TO A NEGOTIABLE INSTRUMENT.

The following extract from the opinion of Parke, B., in Foster *v.* Dawber[1], the leading case on the subject sufficiently expresses the English law prior to the enactment of the Bills of Exchange Act in 1882.

"Mr. Willes disputed the existence of any rule of law by which an obligation on a bill of exchange by the law merchant can be discharged by parol, and he questioned the decisions, and contended that the authorities merely went to show that such an obligation might be discharged as to remote but not as between immediate parties. The rule of law has been so often laid down and acted upon, although there is no case precisely on the point as between immediate parties, that the obligation on a bill of exchange may be discharged by express waiver, that it is too late now to question the propriety of that rule. In the passage referred to in the work of my brother Byles, the words 'it is said' are used, but we think the rule there laid down is good law. We do not see any sound distinction between the liability created between immediate and distant parties. Whether they are mediate or immediate parties the liability turns on the law merchant, for no person is liable on a bill of exchange except through the law merchant; and, probably, the law merchant being introduced into this country, and differing very much from the simplicity of the common law, at the same time was introduced that rule quoted from Palliet [2] as prevailing in foreign countries, viz., that there may be a release and discharge from a debt by express words, although unaccompanied by satisfaction or by any solemn instrument. Such appears to be the law of France, and probably it was for the reason above stated that it has been adopted here with respect to bills of exchange. But Mr. Willes further contended, that though the rule might be true with respect to bills of exchange, it did not apply to promissory notes, inasmuch as they are not put upon the same footing as bills of exchange by the statute law. The negotiability of promissory notes was created by the statute 3 & 4 Anne, c. 9, which recites that 'notes in writing signed by the party who makes the same, whereby such party promises to pay unto any other person or his order any sum of money therein mentioned are not assignable or indorsable over, within the custom of merchants to any other person' (that is one of the properties promissory notes are recited not to have); 'and that such persons to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same.' That appears to apply to cases of the original liability on a note, as well as to those cases where the liability has been created by the assignment of that instrument. Now bills of exchange and promissory notes differ from other contracts at common law in two important particu-

[1] (1851) 6 Ex. 839, 851.
[2] Manuel de Droit Civil, Code Civ., liv. 3, tit. 3, s. 3.

lars: first, they are assignable, whereas choses in action at common law are not; and secondly, the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. In both these important particulars promissory notes are put on the same footing as bills of exchange by the statute of Anne, and, therefore we think the same law applies to both instruments. This court was of this opinion in a case of Mayhew *v.* Cooze,[1] in which there was a plea similar to the present, although the expression of that opinion was not necessary for the decision of that case."[2]

The Bills of Exchange Act now provides:[3]

"62 (1) When the holder of a bill[4] at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

The requirement of a writing effected a change in the English law. It was adopted from the Scotch law.[5]

The doctrine of Foster *v.* Dawber was never adopted by the American courts and it was uniformly held that consideration was necessary to make effectual an agreement to discharge a party to a negotiable instrument.[6] The drafts-

[1] 23d November, 1849, not reported.

[2] In White *v.* Bluett (1853) 23 L. J. Ex. (N. S.) 36, the defendant, when sued upon a promissory note, pleaded an agreement by the payee to discharge it in consideration of an agreement by the defendant to forbear to make certain complaints. The court held the alleged consideration insufficient and gave judgment for the plaintiff, but as the forbearance asked for was in fact given and as there was nothing illegal in the bargain, it is difficult to see why the doctrine of Foster *v.* Dawber, to which Parke, B., alluded, should not have been applied. [3] 45 & 46 Vict. c. 61.

[4] The provisions of this section are made applicable to promissory notes by Sec. 89. [5] Chalmers' Bills of Exchange (5th ed.) 212.

[6] Maness *v.* Henry (1891) 96 Ala. 454; Scharf *v.* Moore (1893) 102 Ala. 468; Upper San Joaquin Co. *v.* Roach (1889) 78 Cal. 552; Rogers *v.* Kimball (1898) 121 Cal. 247; Heckman *v.* Manning (1879) 4 Col. 543; Adamson *v.* Lamb (1834) 3 Blackf. 446; Denman *v.* McMahin (1871) 37 Ind. 241; Carter *v.* Zenblin (1879) 68 Ind. 437; Hanlon *v.* Doherty (1886) 109 Ind. 39; Franklin Bank *v.* Severin (1890) 124 Ind. 317; Shaw *v.* Pratt (1839) 22 Pick. 305; Smith *v.* Bartholomew (1840) 1 Met. 276; Bragg *v.* Danielson (1886) 141 Mass. 195; Hale *v.* Dressen (1899) 76 Minn. 183; Henderson *v.* Henderson (1855) 21 Mo. 379; Irwin *v.* Johnson (1882) 36 N. J. Eq. 347; Crawford *v.* Millspaugh (1816) 13 Johns. 87; Seymour *v.* Minturn (1819) 17 Johns. 169; Campbell's Est. (1847) 7 Pa. St. 100, 101; McGuire *v.* Adams (1848) 8 Pa. St. 286; Kidder *v.* Kidder (1859) 33 Pa. 268; Horner's App. (1882) 2 Pennypacker 289; Corbett v. Lucas (1827) 4 McCord L. 323.

See, however, Nolan *v.* Bank of New York (1873) 67 Barb. 24, 34.

man of the American Negotiable Instruments Law,[1] however, copied the provision of the English act, and in States where this law has been enacted,[2] therefore, a written renunciation or discharge is good without consideration.

WRITTEN CONTRACTS.

"By the general rules of the common law, if there be a contract which has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."[3]

It is also true that if the agreement to discharge or vary a contract is made after its breach, it is immaterial whether the original bargain was or was not in writing. The later agreement is an accord, and if the parties so intend will operate at once without performance to discharge the liability for breach of the original contract.[4]

If an executory contract is within the Statute of Frauds and is in writing or a proper written memorandum has at

[1] Crawford Negot. Inst. Law, § 203.

[2] New York Laws of 1897 Ch. 612. New York Laws of 1898 Ch. 336. Connecticut Laws of 1897 Ch. 74. Colorado Laws of 1897 Ch. 64. Florida Laws of 1897 Ch. 4524. Massachusetts Laws of 1898 Ch. 533. Massachusetts Laws of 1899 Ch. 130. Maryland Laws of 1898 Ch. 119. Virginia Laws of 1897-8 Ch. 866. Rhode Island Laws of 1899 Ch. 674. Tennessee Laws of 1899 Ch. 94, North Carolina Laws of 1899 Ch. 733. Wisconsin Laws of 1899 Ch. 356. North Dakota Laws of 1899 Ch. 113. Utah Laws of 1899 Ch. 149. Oregon Laws of 1899 Sen. Bill 27. Washington Laws of 1899 Ch. 149. Dis. of Columbia Laws of 1899 U. S. Stats. Arizona R. S. 1901 Title XLIX, §§ 3304-3491. Pennsylvania Laws of 1901 Ch. 162. Ohio Laws of 1902 Sen. Bill 10; Iowa Laws of 1902 Ch. 130. New Jersey Laws of 1902 Ch. 184. Montana Laws of 1903 Ch. 121. Idaho Laws of 1903, Sen. Bill 86. Kentucky Laws of 1904. Louisiana Laws of 1904.

[3] Goss *v.* Lord Nugent (1833) 5 B. & Ad. 58, 64. See in accord Pioneer Savings Co. *v.* Nonnemacher (Ala. 1900) 30 So. Rep. 79; Swain *v.* Seamens (1869) 9 Wall. 254, 271; Calliope Min. Co. *v.* Herzinger (1895) 21 Col. 482; Ward *v.* Walton (1853) 4 Ind. 75; Walter *v.* Victor G. Bloede Co. (1901) 94 Md. 80, 85; Cummings *v.* Arnold (1842) 3 Met. 486, 489; Barton *v.* Gray (1885) 57 Mich. 622; Van Santvoord *v.* Smith (1900) 79 Minn. 316; Chouteau *v.* Jupiter Iron Works (1887) 94 Mo. 388; Warren *v.* Mayer Mfg. Co. (1900) 161 Mo. 112, 121; Bryan *v.* Hunt (1857) 4 Sneed, 543; Montgomery *v.* American Ins. Co. (1900) 108 Wis. 146, 159.

[4] 17 Harv. L. Rev. 464.

some time been made, a subsequent oral agreement to rescind the contract is effectual if the oral agreement fulfills the requisites of a contract at common law. The Statute of Frauds does not mention contracts of rescission or discharge and such contracts are therefore not affected by its terms.[1] An exception to this rule should, perhaps, be made in the case of contracts relating to land. As such contracts create immediately an equitable interest in the land,[2] the contract to rescind necessarily involves the surrender of an interest in land. This has been so held[3] and the reasoning seems unanswerable, but there is contrary authority,[4] which takes no distinction between contracts for an interest in land and other contracts within the statute. If the agreement to rescind was paid for, or anything was done in accordance with the agreement which could operate as an accord and satisfaction, the original agreement is doubtless effectually discharged.[5] On the other hand it should be noticed that if a contract has been partly executed by the transfer of either real or personal property, an agreement of rescission which contemplates not simply a discharge of unexecuted obligations but a re-transfer of the property must certainly be within the sections of the statute relating to sales of land or that relating to sales of goods.

More difficult questions are presented when the subsequent oral agreement does not purport totally to rescind but only to vary some of the terms of an original bargain, which was within the Statute of Frauds but of which a memorandum had been made, it seems clear on princi-

[1] Goss *v.* Lord Nugent (1833) 5 B. & Ad. 58, 66.

[2] Equitable interests are within the statutes. Toppin *v.* Lomas (1855) 16 C. B. 145; Smith *v.* Burnham (1838) 3 Sumn. 435; Dougherty *v.* Catlett (1889) 129 Ill. 431; Browne on the Statute of Frauds, § 229.

[3] Catlett *v.* Dougherty (1886) 21 Ill. App. 116 [see Dougherty *v.* Catlett (1889) 129 Ill. 431]; Dial *v.* Crain (1853) 10 Tex. 444, 454 [see also Huffman *v.* Mulkey (1890) 78 Tex. 556].

[4] Goss *v.* Lord Nugent (1833) 5 B. & Ad. 58, 66; [see, however, Harvey *v.* Graham (1836) 5 A. & E. 61, 73]; Buel *v.* Miller (1827) 4 N. H. 196; Boyce *v.* McCulloch (1842) 3 W. & S. 429; Brownfield's Ex. *v.* Brownfield (1892) 151 Pa. 565. See also Browne on the Statute of Frauds, § 431 *et seq.*

[5] Burns *v.* Fidelity Real Estate Co. (1892) 52 Minn. 31, 36; Warren *v.* Mayer Mfg. Co. (1900) 161 Mo. 112, 122; Long *v.* Hartwell (1870) 36 N. J. L. 116; Miller *v.* Pierce (1889) 104 N. C. 389; Jones *v.* Booth (1882) 38 Ohio St. 405; Phelps *v.* Seely (1872) 22 Gratt. 573; Jordan *v.* Katz (1893) 89 Va. 628, 630.

ple that no right of action can lie for breach of the second agreement or of the first and second combined. To allow such a right would be to enforce a contract within the statute when some terms at least of the contract were oral.[1] On the other hand, if the terms of the oral contract have been performed, such performance operates as a satisfaction of the liability on the original contract. The Statute of Frauds does not apply to executed contracts, so that when the oral agreement is performed its performance has the effect which the parties agreed it should have.[2] If the terms of the oral agreement have not been performed, the original contract still remains in force. Though an oral agreement to rescind without more would be effectual, where the rescission is to be effected only by the necessary implication contained in the agreement to substitute a new contract differing in some of its terms from the old one, there can be no rescission if the agreement for substitution is invalid.[3] Even if one party offers to perform his promise under the new agreement, the other party may, according to the better view, still insist on the original contract, and refuse to accept the substituted performance to which he had orally agreed.[4] In an early case,[5] however, the Supreme Court of Massachusetts adopted a distinction

[1] Stead *v.* Dawber (1839) 10 A. & E. 57 (overruling Cuff *v.* Penn (1813) 1 M. & S. 21); Marshall *v.* Lynn (1840) 6 M. & W. 116; Noble *v.* Ward (1866) L. R. 1 Ex. 117; Carpenter *v.* Galloway (1881) 73 Ind. 418; Bradley *v.* Harter (1900) 156 Ind. 499; Cummings *v.* Arnold (1842) 3 Met. 486, 491; King *v.* Faist (1894) 161 Mass. 449, 456; Heisley *v.* Swanstrom (1889) 40 Minn. 199; Burns *v.* Fidelity Real Est. Co. (1892) 52 Minn. 31; Thompson *v.* Thompson (1899) 78 Minn. 379; Rucker *v.* Harrington (1892) 52 Mo. App. 481; Warren *v.* Mayer Mfg. Co. (1900) 161 Mo. 112; Dana *v.* Hancock 30 Vt. 616.

[2] Moore *v.* Campbell (1854) 10 Ex. 323; Leather Cloth Co. *v.* Hieronymus (1875) L. R. 10 Q. B. 140; Swain *v.* Seamens (1869) 9 Wall. 254; Long *v.* Hartwell (1870) 34 N. J. L. 116, 127; Jackson *v.* Litch. (1869) 62 Pa. 451; Ladd *v.* King (1849) 1 R. I. 224, 231: Cf. Dana *v.* Hancock 30 Vt. 616.

[3] Noble *v.* Ward (1867) L. R. 2 Ex. 135; Hasbrouck *v.* Tappen (1818) 15 Johns. 200; Barton *v.* Gray (1885) 57 Mich. 622, 632.

[4] Stowell *v.* Robinson (1837) 3 Bing. N. C. 937; Noble *v.* Ward (1867) L. R. 2 Ex. 135; Plevins *v.* Downing (1876) 1 C. P. D. 220; Swain *v.* Seamens (1869) 9 Wall. 254, 271; Lawyer *v.* Post (1901) 109 Fed. Rep. 512; Bradley *v.* Harter (1901) 156 Ind. 499; Walter *v.* Victor G. Bloede Co. (1901) 94 Md. 80; Rucker *v.* Harrington (1892) 52 Mo. App. 481; Warren *v.* Mayer Mfg. Co. (1900) 161 Mo. 112; Clark *v.* Fey (1890) 121 N. Y. 470. See also Dana *v.* Hancock, 30 Vt. 616. Cummings *v.* Arnold (1842), 3 Met. 486.

[5] Cummings *v.* Arnold (1842) 3 Met. 486.

that was suggested by Lord Ellenborough in Cuff *v.* Penn.[1] between the contract and its performance. "The statute," Wilde, J., says, "requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance." The court then proceeds to argue that as a substituted performance would operate as a satisfaction of the original contract, and tender is equivalent to performance, the plaintiff could sue on the original contract and prove in support of it an offer to perform with the alterations later agreed upon. But the prevailing view is that even in the case of a binding contract of accord, tender is not equivalent to performance, and there is no satisfaction even if the tender is wrongfully refused.[2] However this may be, a tender where there is no obligation to accept it cannot possibly have the effect of performance. The learned author of the leading text book on the subject[3] gives his approval to the decision, but the current of authority seems strongly against it.

No distinction is taken in the cases between large changes from the original agreement and slight ones, such as the extension for a brief period of the time for performance. The validity of such a distinction has been explicitly denied.[4] "Every part of the contract in regard to which the parties are stipulating must be taken to be material."[5]

Though an attempted oral modification of a contract within the statute is wholly ineffectual to accomplish the intent of the parties, yet the actual forbearance by one party at the request of the other to enforce a contract at the time when performance was due may produce important legal consequences. In Ogle *v.* Vane[6] it was held that the plaintiff who had contracted to buy iron from the defendant in July, and who, after waiting at the defendant's

[1] (1813) 1 M. & S. 21. The suggestion was repudiated in Stead *v.* Dawber (1839) 10 A. & E. 57, and Marshall *v.* Lynn (1840) 6 M. & W. 109, and is wholly discredited in England.

[2] 17 Harv. L. Rev. 462.

[3] Browne on the Statute of Frauds § 424. See also Smith *v.* Loomis (1883) 74 Me. 503; Lee *v.* Hawks (1891) 68 Miss. 669. *Cf.* Wiessner *v.* Ayer (1900) 176 Mass. 425.

[4] Goss *v.* Lord Nugent (1833), 5 B. & Ad. 67; Harvey *v.* Grabham (1836) 5 A. & E. 74; Marshall *v.* Lynn (1840), 6 M. & W. 116.

[5] Per Parke, B., Marshall *v.* Lynn (1840) 6 M. & W. 116, 117.

[6] (1867) L. R. 2 Q. B. 275; (1868) L. R. 3 Q. B. 272.

request till the following February, then bought in the market, could charge the defendant for damages based on the price in February, though the price was higher then than in July. The court relied to some extent on the fact that though there was forbearance at the defendant's request there was no agreement to forbear, but it seems an agreement would have made no difference, for the agreement would neither have rescinded the original contract nor have had any effect itself, except in so far as it was performed.[1]

In Hickman *v.* Haynes,[2] the plaintiff had agreed to sell and the defendant to buy iron in the future. The defendant had requested, before the time for performance, an enlargement of the time for taking delivery. This was granted, but the defendant ultimately refused altogether to take the iron. In an action on the contract the defendant set up that the plaintiff was not himself ready and willing to perform the contract at the time when performance was due according to the written memorandum. The court held that though before that time "either party could have changed his mind and required the other to perform the contract according to its original terms,"[3] yet after having induced the plaintiff to withhold delivery the defendant could not thereafter insist that prompt delivery was a condition precedent to a right of action. In this case, as in the preceding, the court said there was no agreement to forbear, but merely a voluntary forbearance, but here also it is hard to see that a mutual agreement, which was unenforceable, would have altered the decision.[4]

If so much of a contract as is within the Statute of Frauds is fully performed, other obligations or liabilities on the contract may obviously be discharged or modified in any way that contracts not within the statute may be. Thus

[1] Smiley *v.* Barker (C. C. A. 1897), 83 Fed. Rep. 684; Barton *v.* Gray (1885) 57 Mich. 622, 636; see Hasbrouck *v.* Tappen (1818), 15 Johns. 200. *Cf.* Sanderson *v.* Graves (1875), L. R. 10 Ex. 234.

[2] (1875) L. R. 10 C. P. 598.

[3] *Quaere* if the change of mind was so near the time for performance as to make performance extremely difficult for the other party. See Tyers *v.* Rosedale Co. (1873), L. R. 8 Ex. 305; (1875) L. R. 10 Ex. 195.

[4] Smiley *v.* Barker (C. C. A. 1897), 83 Fed. Rep. 684; Barton *v.* Gray (1885) 57 Mich. 622, 636. But see Sanderson *v.* Graves (1875) L. R. 10 Ex. 234.

in Negley *v.* Jeffers,[1] there was a contract for the sale of land and the land was actually conveyed. After the conveyance an agreement was made by the vendee for valuable consideration to waive certain conditions precedent to his obligation to pay the price. It was held this agreement though oral was binding.

Contracts Under Seal.

If the original contract was under seal the same questions are presented with the additional difficulty, which at common law was insuperable, that an obligation by deed could not be discharged or varied by anything of inferior nature.[2]

This rule was applicable to any discharge attempted either before breach of the deed or after the breach of the deed if the obligation created by the deed was to pay a fixed sum of money. If, however, a covenant was for the performance of anything other than the payment of a fixed sum of money, breach of the covenant gave rise merely to a right of action for unliquidated damages, and such a right of action was subject to the same rules as to discharge that are applicable to simple contracts.[3]

Accordingly, if an obligation under seal created reciprocal rights, a mutual agreement before breach of the obligation to surrender such rights or to substitute others for them did not discharge or alter the effect of the deed.[4] The suggested mutual agreement by parol evidently contains all the requisite elements of a contract, but there seems no recognition of its validity as a contract in any decision before the beginning of the nineteenth century, and it is hard to distinguish it from an unexecuted accord which was held not valid as a contract.[5] In Nash *v.* Arm-

[1] (1875) 28 Ohio St. 90

[2] See cases *infra* and also 17 Harv. L. Rev. 466.

[3] Blake's Case, 6 Rep. 342.

[4] Rogers *v.* Payne (1768) 2 Wils. 376; Braddick *v.* Thompson (1807) 8 East. 344; West *v.* Blakeway (1841) 2 Man. & G. 729; Ellen *v.* Topp (1851) 6 Ex. 424; Herzog *v.* Sawyer (1883) 61 Md. 344, 352; see also 17 Harv. L. Rev. 466.

[5] Allen *v.* Harris (1695) 1 Ld. Raym. 122; Lynn *v.* Bruce (1794) 2 H. Bl. 317; Reeves *v.* Hearn (1836) 1 M. & W. 323.

strong,[1] however (which was decided after the passage of the Common Law Procedure Act of 1854[2] had permitted the use of equitable pleas at law), it was held that such a parol agreement was not only in itself a binding contract, but it was also said that the performance of the contract would "be ground for an unconditional perpetual injunction against proceeding upon the deed," and consequently would be the basis of a good equitable plea in an action at law. At the present day this doctrine would be generally accepted. Indeed, many modern authorities go farther than this. Even though the parol agreement has not been performed, if it was intended in substitution of the earlier sealed contract, this intention is frequently given full effect. In jurisdictions where by statute the effect of a seal has been abolished or seriously diminished, this result is based on clear principle, for if a contract under seal is reduced to the level of a mere written contract in other respects, there is no reason why it should not be discharged or varied by subsequent written or oral bargains.[3] But in leading jurisdictions, where seals still have in most respects their old value, the rule forbidding discharge or variation by parol has been done away with.[4] In some jurisdictions, however, this rule still persists,[5] and as it has the support of the

[1] (1861) 10 C. B. N. S. 259. In Braddick *v.* Thompson (1807) 8 East. 344, 346, the court said *obiter* in denying that a parol agreement could discharge a bond: "His only remedy was by bringing a cross-action upon the agreement against the plaintiff, for suing upon the bond in breach of such agreement."

[2] S. 83.

[3] So held in Barton *v.* Gray (1885) 57 Mich. 634; Blagborne *v.* Hunger (1894) 101 Mich. 375; Bowman *v.* Wright (1902) 65 Neb. 661; McIntosh *v.* Miner (1899) 37 N. Y. App. Div. 483.

[4] Steeds *v.* Steeds (1889) 22 Q. B. D. 537; Canal Co. *v.* Ray (1879) 101 U. S. 522; Hastings *v.* Lovejoy (1885) 140 Mass. 261; Tuson *v.* Crosby (1899) 172 Mass. 478; Stees *v.* Leonard (1874) 20 Minn. 494; McGrann *v.* North Lebanon R. Co. (1857) 29 Pa. 82; Hamilton *v.* Hart (1885) 109 Pa. 629; Hydeville Co. *v.* Eagle R. R. Co. (1872) 44 Vt. 395; see also Phelps *v.* Seely (1872) 22 Gratt. 573.

[5] Miller *v.* Hemphill (1849) 9 Ark. 488; Levy *v.* Very (1851) 12 Ark. 148; Smith *v.* Lewis (1856) 24 Conn. 624; Tischler *v.* Kurtz (1895) 35 Fla. 323; Sinard *v.* Patterson (1834) 3 Blackf. 353; McMurphy *v.* Garland (1867) 47 N. H. 316; Armijo *v.* Abeytia (1891) 5 N. Mex. 533; Delacroix *v.* Bulkley (1834) 13 Wend. 71; Eddy *v.* Graves (1840) 23 Wend. 82; Coe *v.* Hobby (1878) 72 N. Y. 141; Smith *v.* Kerr (1888) 108 N. Y. 31; McKenzie *v.* Harrison (1890) 120 N. Y. 260, 263. (But see McCreery *v.* Day (1890) 119 N. Y. 1; McIntosh *v.* Miner (1899) 37 N. Y. App. Div. 483.) Bond *v.* Jackson (1814) Cooke 500; Sherwin *v.* Rutland &c. R. Co. (1852) 24 Vt. 347. Some of these decisions would perhaps now not be followed in their own jurisdictions.

whole early law, English and American, the matter cannot be considered settled in any jurisdiction unless the court of that jurisdiction has either abrogated the rule, in which case it is not likely to recede, or has expressly considered it in a recent case. In Illinois the court takes a middle ground. Thus in Starin *v.* Kraft,[1] the Supreme Court of that state held that a sealed executory option to sell a tract of land "estimated to contain forty-five acres * * * the precise quantity * * * to be ascertained by a correct survey," could not be changed so as to make good a tender of a sum based on the estimated quantity, by proof of a parol agreement between the parties to treat this quantity as correct. The court said:

"It cannot be maintained * * * that the parol agreement to substitute the fixed amount of forty-five acres for the actual amount to be ascertained by survey was an executed parol agreement. The entire agreement which is set up by defendant in error as to the basis of his suit, is partly under seal and partly by parol, and altogether executory; and that it has never been executed, either as to the provisions under seal or the provision by parol, is determined by the fact that a tender of performance, in accordance with the parol provision on the one side, and a refusal to so perform on the other constitute the grounds of the suit. But it is contended by counsel for appellee * * * that where, by parol, a condition of a sealed instrument is waived, and the parties act or fail to act, because of such waiver, the doctrine of estoppel will preclude a denial of the effect of the parol agreement, and in support of this contention they cite White *v.* Walker, 31 Ill. 422; Vroman *v.* Darrow, 40 *Id.* 171; Fisher *v.* Smith, 48 *Id.* 184; Defenbaugh *v.* Weaver, 87 *Id.* 132; Worrell *v.* Forsyth, 141 *Id.* 22; Moses *v.* Loomis, 156 *Id.* 392.[2] In Worrell *v.* Forsyth the parol agreement had been fully executed. In each of the other cases it will be found, upon examination, that the facts constituted a waiver of the terms or conditions in question, which waiver was in the nature of a release, surrender or discharge, and hence would come under the rule here obtaining, that a contract under seal may be released, surrendered or discharged by matters *in pais*. * * * There is not here the mere subtraction of an element or condition of the sealed contract without changing its import, but, on the contrary, there is the attempted substitution of new matter which is essential to sustain the right of action. * * * Nor can we concede that the doctrine of equitable estoppel may be applied at law to enforce such a change by parol in a sealed executory contract. We regard the parol agreement sought to be made a part of this executory contract under seal as insufficient, if established, to support his suit for breach of it."

[1] (1898) 174 Ill. 120.

[2] To these cases may be added Palmer *v.* Meriden Brittannia Co. (1901) 188 Ill. 508.

If an agreement for the discharge of a sealed obligation contemplates not an immediate mutual surrender of rights but the performance of something other than the duty imposed by the deed in satisfaction of that duty, and further contemplates that until such performance the deed shall remain in force, the agreement is one of accord if made after a right of action on the deed has arisen; if made before a right of action has arisen the agreement is not properly called an accord but such agreements are more conveniently considered in connection with accords.

The doctrine of exoneration or discharge of a contract before breach without consideration never applied to sealed instruments.[1]

SAMUEL WILLISTON.

[1] Irwin *v.* Johnson (1882) 36 N. J. Eq. 347; Traphagen *v.* Voorhees (1888) 44 N. J. Eq. 21; Tulane *v.* Clifton (1890) 47 N. J. Eq. 351; Jackson *v.* Stackhouse (1823) 1 Cow. 122; Albert's Ex. *v.* Ziegler's Ex. (1857) 29 Pa. 50; Horner's App. (1882) 2 Pennypacker 289; Ewing *v.* Ewing (1830) 2 Leigh, 337.